No. 93-289

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.,

Petitioners,

v.

ARLEN SPECTER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari.[1]

REASONS FOR DENYING THE PETITION

A. Petitioners Would Render The "Fair Process" Purpose Of The Base Closure Act A Complete Nullity.

The issue presented is clear: Will the Base Closure Act ensure a "*fair process*" — as Congress expressly intended — or will its very purpose be rendered a nullity because there is no way to enforce its procedural mandates?[2] In this case, petitioners have blatantly ignored mandatory

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1. Respondents are United States Senators Arlen Specter, Harris Wofford, Bill Bradley and Frank R. Lautenberg; United States Representatives Robert E. Andrews, Curt Weldon, Marjorie Margolies-Mezvinsky, James C. Greenwood and Robert A. Borski; the Commonwealth of Pennsylvania and its Governor Robert P. Casey and Attorney General Ernest D. Preate, Jr.; the State of New Jersey and its Governor James J. Florio and Attorney General Fred DeVesa; the State of Delaware and its Governor Thomas R. Carper; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3; the Metal Trades Council, Local 687 Machinists; Planners Estimators Progressmen & Schedulers Union, Local No. 2; and Union representatives William F. Reil, Howard J. Landry and Ronald Warrington. *See* Sup. Ct. R. 35.3.

2. Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808. Section 2901(b) of the Act provides:

> "Sec. 2901. Short Title and *Purpose*
>
> • • •
>
> (b) *Purpose. — The purpose* of this part is to provide a *fair process* . . . ." (Emphasis added).

procedural requirements of the Act.[3] If judicial review were denied, "fair process" could be defeated every time simply by the bureaucracy's refusal, as in this case, to adhere to fundamental statutory safeguards.

Had it so chosen, Congress easily could have vested the President with unrestricted discretion to close bases unilaterally, using any criteria he desired or no criteria at all. However, Congress chose instead to promulgate the Base Closure Act, with the *express purpose* of ensuring a "*fair process*". §2901(b) (emphasis added).

To achieve a fair process, the Secretary of Defense and the Base Closure Commission are mandated to follow non-discretionary statutory procedures. As petitioners concede:

> "[T]he Secretary of Defense *must* submit a six-year 'force-structure plan . . . based on an assessment . . . of the probable threats to the national security' during that period. §2903(a). The Secretary also *must* establish, *after notice and an opportunity for public comment,* selection criteria to be used in making base closure recommendations. §2903(b). *Based on* the force-structure plan and selection criteria . . ., the Secretary must prepare base closure recommendations . . . §2903(c).
>
> The Act *requires* the Secretary of Defense . . . to forward his recommendations to Congress and to the . . . Commission . . . §§2902(a), 2903(c)(1). The Secretary *must* make available to the Commission and the Comptroller General . . . all the information used in making his recommendations. §2903(c)(4). The Commission *is charged with holding public hearings* and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. §2903(d)(1) and (2)". (Pet. at 3-4) (emphasis added).[4]

3. Because the District Court dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6), respondents' factual allegations of blatant procedural violations by petitioners must be deemed true. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). *See* note 4 *infra* at p. 3.

The proposed list of closures — required to have been formulated in accordance with the fair process mandated by Congress — then goes to the President, who has a mere 15 days to review it and accept or reject it *in its entirety.* (Pet. at 4-5, 23-24).

As the Third Circuit emphasized, the procedures mandated by the Act are not mere window-dressing, but rather are the heart of the legislation. The President *must* rely upon the integrity of the process that resulted in the recommended closure list since he has neither the time nor the resources to verify independently that the process was fair.[5] Moreover, he has *no authority* to act if the mandated statutory process was violated:

> "'[W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish *exclusive means* for closure of domestic bases. §2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of*

4. Respondents' allegations, which must here be accepted as true, establish, *inter alia*, that (a) petitioners deliberately disabled the Comptroller General from performing his statutory duties by withholding key information; (b) in the proceedings before the Commission, all information favorable to respondents was suppressed from the public and closed-door meetings with the Navy were held after the completion of public hearings in order to gather information necessary to support the Navy's predetermined decision to close the Philadelphia Naval Shipyard; and (c) the Navy compiled a "stealth list" of base closings from a prior base closure list and manipulated the base closure criteria to close the Shipyard. All of these allegations must be deemed to be true. *See* note 3 *supra.*

5. Thus, the actions of the Secretary of Defense and the Commission indisputably are "final agency action" for purposes of judicial review. *See* pp. 11-14 *infra*.

the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.'

* * *

[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process." (App. 7a, 12a) (emphasis added).

It follows inexorably that judicial review must exist to determine whether the procedures mandated by Congress have been followed. Historically, only the federal courts have performed this critical check-and-balance function.[6]

Petitioners argue that there is no judicial review because the Secretary of Defense's and the Commission's reports are not "final agency action" in that they are merely "tentative", "preliminary" and "nonbinding" and have "no direct effect". (Pet. at 12, 18-19). Clearly, however, the agencies' reports *are* "final" from an administrative perspective, since there is nothing left for the agencies to do, and they *do* have a direct effect because the President must rely upon them and, indeed, has no authority to act

6. Petitioners err in contending that the need for judicial review is supplanted by the provision in the Base Closure Act for congressional disapproval of proposed closures by joint resolution. (Pet. at 4-5). First, Congress has only a mere 45 days in which to act. §2904(b). Second, accepting *arguendo* petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. at 5), the President would have total power to decide base closures. If that is what Congress had intended, the Base Closure Act would have been unnecessary.

unless the integrity of the process which produced them was maintained.[7]

If, as petitioners contend, it makes no difference whether or not the proposed closures have been determined in accordance with the fair process mandated by Congress, then the purpose of the Base Closure Act has effectively been nullified. Such a conclusion would violate the fundamental precept of statutory construction that legislation must be interpreted in a manner which effectuates, not frustrates, its purpose. *See, e.g., United States v. Menasche,* 348 U.S. 528, 538-39 (1955) ("'The cardinal principle of statutory construction is to save and not to destroy.' . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States,* 335 U.S. 1, 31 (1948) ("[w]e must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 392 (1940) ("[Appellant's] construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question").

The fallacies in petitioners' interpretation that there is no judicial review are illustrated by the following

7. The President must accept or reject the list submitted as a whole. If a military installation does not appear on a list submitted by the Commission to the President, it *cannot be closed* under the Act. §2903(e).

hypothetical:[8] Assume that: (1) totally ignoring his statutory duty (§2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather on his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) with knowledge of these violations and in violation of its own statutory duties (§2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider and debate a joint resolution of disapproval within 45 days; (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live — all *without* a fair process.

If, as petitioners urge, the federal courts lack jurisdiction even to review the most blatant, unlawful and contemptuous violations of the process expressly mandated by Congress, then not only will public confidence in the integrity of government be shattered,[9] but the very foundation of the Republic will be shaken.

8. The facts stated are only slightly more extreme than those actually alleged, and must be accepted as true, in this case.

9. The Act mandates a "fair process" to ensure that affected individuals and communities will accept the painful and permanent effects of base closure. To that end, the Act contains a host of non-discretionary procedural safeguards, none of which appear in predecessor base closure statutes. *See* 10 U.S.C. §2687 (1977) (Secretary of Defense permitted to select bases for closure unilaterally); Pub. L. No. 100-526, §§201-209, 102 Stat. 2623, 2627-34 (1988) (permitting closures on the basis of secret meetings and unverified information). Thus, not only do the structure, purpose and history of the Act *not* demonstrate an

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B. The Third Circuit's Opinions Are Consistent With *Franklin*.

Although this Court declined in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), to permit review of the President's decision under the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.* ("APA"),[10] it held that "*the President's actions may still be reviewed for constitutionality*". 112 S. Ct. at 2776 (emphasis added). The Third Circuit, applying *Franklin*, held that judicial review is likewise available here because the President's action in approving the base closure list "failed to comply with the mandatory procedural requirements of the only statute authorizing such action and ... thereby violated the constitutionally-mandated separation of powers". (App. 14a). Accordingly, the Third Circuit found *Franklin* to be "affirmative support" for its holding:

> "[T]here is a constitutional aspect to the exercise of judicial review in this case — an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case." (App. 10a).

Judicial review is also available under the APA because the actions of the Secretary of Defense and the Base Closure Commission were "final" within the meaning of *Franklin*. *See* pp. 11-14 *infra*.

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intent by Congress to preclude judicial review (Pet. at 20-28), but they literally cry out for the judiciary to perform its historic role.

10. The APA subjects the "final" actions of federal agencies to judicial review. *Franklin* held on its unique facts that the final act in question in that case was that of the President, not an administrative agency, and that the President is not an agency subject to the APA. 112 S. Ct. at 2775.

1. The Third Circuit's Opinions Properly Rely Upon and Apply the *Youngstown* Doctrine.

Petitioners argue that their egregious conduct is forever insulated from all judicial review because under the Base Closure Act it is "the President" who acts finally to approve or disapprove bases for closure. Yet even if that were true,[11] the President *must* have constitutional or statutory authority for his actions. Indeed, this Court's seminal decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) — which established that "[t]he President's power ... must stem either from an act of Congress or from the Constitution itself" — was cited with approval in *Franklin*, 112 S. Ct. at 2776. The Third Circuit explained:

> "We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. *See id.* at 585; *see also United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990) ('It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any ... must stem from an act of Congress or from the Constitution itself.' (citing *Youngstown Steel*); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) ("'*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.'" (quoting *Nixon v. Sirica*, 487 F.2d 700, 793

11. As discussed *infra* at pp. 11-14, the "final" action for purposes of judicial review under the APA was taken not by the President, but by the Secretary of Defense and the Base Closure Commission.

> (Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. *See, e.g., National Treasury Employees Union*, 492 F.2d at 604 ('[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.'); *see also* U.S. Const. Art. II, §3 ('[T]he President shall take care that the laws be faithfully executed ...')."[12] (App. 11a).

In the present case, the President's authority to act with respect to the Commission's recommendations is *linked inextricably* to the integrity of the administrative process which preceded his involvement. The failure of the Secretary of Defense and the Commission to comply with non-discretionary procedural mandates of the Act left the President without authority to act on such recommendations. As the Third Circuit emphasized:

12. Courts have long recognized "general principles of judicial review" where (as here) express statutory procedures have been blatantly ignored. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (recognizing under general principles of judicial review that an agency must articulate a basis for its findings in reports to the President); *Leedom v. Kyne*, 358 U.S. 184, 190-191 (1958) (courts will not lightly infer that Congress does not intend the judiciary to protect rights it confers against agency actions taken in excess of delegated powers); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 551 (1937) ("It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers ... to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority"); *U.S. ex rel. Kansas City So. R. Co. v. Interstate Commerce Commission*, 252 U.S. 178, 187-188 (1920) (court has power to enforce an agency's refusal to discharge duties which a statute exacts). *See also Maple Leaf Fish Co. v. United States*, 596 F. Supp. 1076, 1081 (C.I.T. 1984), *aff'd*, 762 F.2d 86 (Fed. Cir. 1985) (recognizing under general principles of judicial review that an agency must fairly apprise the President, interested parties and the public of the reasoning underlying its recommendations to the President).

"Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown,* not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin.* 112 S. Ct. at 2776 (citing *Youngstown*) .... The President ... must have statutory or constitutional authority for his actions and *where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.*" (App. 12a) (emphasis added).[13]

Petitioners' contention that the Third Circuit misapplied *Youngstown* by "conflating" constitutional, statutory and ultra vires theories (Pet. at 14-19) is sheer sophistry. *Franklin,* citing *Youngstown,* expressly held that "the President's actions may be reviewed for constitutionality". 112 S. Ct. at 2776. If the President has violated the constitutional separation of powers doctrine by exceeding the authority vested in him by Congress, such unconstitutional conduct "may be reviewed". Nothing in *Franklin* even remotely suggests that the only type of constitutional challenge available is the type of challenge involved there.[14]

Petitioners' *in terrorem* argument that the Third Circuit's decisions will result in a flood of "broad non-APA

13. It is obvious from the structure of the statute that the President *must* rely on the procedural integrity of the process, since he is given a scant *15 days* to review the Commission's report and has neither the time nor the resources to research independently or to verify the integrity of that process.

14. In *Franklin*, a violation of the apportionment standards set forth in Article I, §2, cl. 3 of the Constitution was alleged.

judicial challenges to Presidential action" (Pet. at 11, 14-15) must also be rejected. The Base Closure Act is unique in that it was enacted specifically to provide a "fair process" for a highly specialized function — the closure and realignment of military bases. Moreover, this case does *not* involve what petitioners call "routine allegations of statutory error", "garden-variety statutory error" or "routine defects". (Pet. at 14-15). Petitioners' brazen disregard for the non-discretionary procedures mandated by Congress was, one would hope, unprecedented, unparalleled and certainly not "business as usual" for the government.

2. Petitioners' Actions Were "Final" Within the Meaning of *Franklin* and the APA.

For purposes of determining finality under the APA, *Franklin* stated that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties". 112 S. Ct. at 2773. The agency action in *Franklin* was not "final" because the Secretary of Commerce's report to the President carried "no direct consequences" and had "no direct effect". *Id.* at 2774.

Franklin and the present case, however, do not share "similar statutory schemes". (Pet. at 2). Here, the actions of the Secretary of Defense and the Base Closure Commission *did* constitute "final" agency action. Congress did not delegate the decision to close military bases to the President. Rather, it set up mandatory non-discretionary agency procedures to ensure a "*fair process*". The fact that the President has a limited oversight function does not detract from the "finality" of the agencies' actions.[15] On the

15. In fact, a multitude of agency decisions are subject to confirmation by the President and/or Congress. To conclude that none of these decisions is ever "final" and therefore insulated from judicial review would encourage agency disregard for procedural fairness. *See*

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contrary, *only* the agencies are subject to the procedural requirements which are the raison d'etre of the Act, and whether they have complied with those critical requirements directly and materially affects the President's decision. It indisputably is *not* the President's duty to review the procedural integrity of the base closure process or to analyze whether petitioners have complied with the Act's procedural mandates, nor does the Act give him either the time or the resources to do so. *See* §2903(e) (President has only 15 days to review Commission's report). *See also Colorado Environmental Coalition v. Lujan,* 1992 WL 231020 (D. Colo., Sept. 14, 1992) ("Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that ... the challenged agency action is final").

Moreover, under the Base Closure Act, the President cannot revise or amend the Commission's list of closures. His sole authority is to accept or reject the entire list. As petitioners concede:

> "A critical aspect of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard the Commission's role* in the process, the Act provides that its recommendations *must* be considered as an *indivisible package.* H.R. Conf. Rep. No. 923, *supra,* at 704. The President may trigger base closures under the Act only by approving 'all the

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Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Colorado Environmental Coalition v. Lujan*, 1992 WL 231020 (D. Colo., Sept. 14, 1992) (all permitting judicial review of an agency's procedural violations of the National Environmental Policy Act where the agency in question only submitted a recommendation to the President for final approval).

> recommendations' of the independent Commission. See §2903(e)(2) and (4)." (Pet. at 23) (emphasis added).

Therefore, the President *must* rely on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the non-discretionary mandated procedural safeguards.[16] In *Franklin,* by contrast, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner that the results were specifically changed. *Franklin,* 112 S. Ct. at 2774. The statute in *Franklin* also did "not expressly require the President to use the data in the Secretary's report". *Id.*

To apply *Franklin* with the overly broad brush urged by petitioners would eviscerate 40 years of pre-*Franklin* precedent sustaining judicial review of agency action. This Court has repeatedly and consistently sustained the "strong presumption" of judicial review of final agency action under the APA where — as here — there has been a failure to comply with the procedural mandates of a statute.[17] *See, e.g., Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc.,* 112 S. Ct. 459, 460 (1991); *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670-71 (1986); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967); *Leedom v. Kyne,* 358 U.S. 184, 190 (1958). *Accord Franklin,* 112 S. Ct. at

16. *See* note 7 *supra*.

17. This Court has made it equally clear that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 839 (1985). In words directly applicable here, the concurrence in *Heckler* observed: "It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands ...." 470 U.S. at 839.

2783-86 (Stevens, J., concurring).[18] As held by the Third Circuit in the present case, the strong presumption favoring judicial review has *not* been rebutted by petitioners. (App. 39a-63a).

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result, which is the antithesis of this nation's tripartite separation-of-powers government, could not have been intended by this Court in *Franklin*.

C. The Third Circuit's Opinion On Remand Does Not Conflict With *Cohen v. Rice*.

In an attempt to create a "direct conflict" between the Third and First Circuits, petitioners mischaracterize *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as precluding judicial review "of *all* claims under the Base Closure Act". (Pet. at 11) (emphasis added). However, *Cohen* addressed *only* the question of the court's jurisdiction to consider a base closure challenge under Section 701 of the APA and (as petitioners concede) did *not* undertake the constitutional review on which the Third Circuit premised its May 18, 1993 opinion. (Pet. at 20). Given this bright line between the two circuit court opinions, petitioners' alleged

18. Guided by this precedent, the federal courts of appeals have consistently held that judicial review is available under the APA for *procedural* violations by an agency. *See, e.g., First Federal Savings and Loan Association of Lincoln v. Casari*, 667 F.2d 734, 739-740 (8th Cir.), *cert. denied*, 458 U.S. 1106 (1982); *Hollingsworth v. Harris*, 608 F.2d 1026 (5th Cir. 1979); *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978); *Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978). *See also Kirby v. United States Department of Housing & Urban Dev.*, 675 F.2d 60, 67 (3d Cir. 1982) (the "APA circumscribes judicial review only to the extent that ... agency action is committed to agency discretion by law; it does not foreclose judicial review altogether").

"conflict" is artificial and illusory and does not provide a basis for granting certiorari. *See Sanchez v. Borras*, 283 U.S. 798 (1931).[19]

Petitioners' alleged need for "uniformity" between the circuits in order to administer the Base Closure Act is a poorly disguised plea for license to disregard the Act. Whether or not their actions are reviewable by a court, petitioners are bound to abide by the mandatory procedures prescribed by Congress. Even if both the Third Circuit and First Circuit decisions remain intact, petitioners' duty to close bases pursuant to a fair process remains the same.[20]

19. Because, as shown *supra*, the agencies' actions under the Base Closure Act *are* "final" within the meaning of the APA, the First Circuit erred in dismissing *Cohen* for lack of jurisdiction under the APA. The *Cohen* court only superficially focused on the critical distinction between procedural and substantive challenges to agency actions under the Base Closure Act and the APA, and completely disregarded this Court's mandate that judicial review *must* be permitted absent clear evidence of congressional intent to preclude such review. *Cohen* encourages agencies to flout congressional mandates and place themselves beyond the reach of law.

20. Petitioners also attempt to resurrect the argument that this case involves national security and the Court should therefore abdicate its responsibility to review agency compliance with the Act. (Pet. at 20). This is an absolute misstatement. As petitioners well know, having raised the point unsuccessfully below, the express language of the statute *excludes* matters of national security. *See* §2909(c)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

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